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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Amador)

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In re GEORGE E. CROSS on Habeas Corpus.

C052607

This court's review of petitioner's habeas corpus petition has required reconstruction of the original record provided by petitioner because the court clerk's office mistakenly destroyed part of the documents that petitioner originally submitted. We have evaluated petitioner's claims by reviewing the superior court records of his habeas corpus petition, the entire record of his appeal on file in this court, and the documents provided to us by petitioner after we informed him of the mistake. We have asked petitioner to provide us with any document he wanted us to review in this matter. He implies he has done so and, having completed this review of the petition and reconstructed exhibits cited in the duplicated petition, we hereby deny the petition on the merits.

We summarize the procedural history of this case.

Petitioner apparently mailed a petition for habeas corpus to the court on or about April 24, 2006. It appears that, at about the same time, he sent a letter of explanation relating to the petition and shipped five boxes of documents.

According to the clerk's office "received" stamp on the letter, and according to a copy of the daily UPS shipment report from Mule Creek State Prison provided by petitioner and relating to the boxes, the *letter* was received by the court on April 27, 2006, but the *boxes* were not received until April 28, 2006. The letter the court received April 27 refers to the five boxes of materials, but the letter and the boxes were processed separately by different clerical staff. The letter and certain unknown minute orders were returned unfiled to petitioner and no case number was assigned to the petition for habeas corpus.

On May 3, 2006, the clerk's office returned the five boxes to petitioner with a letter saying the clerk was unable to ascertain why the material had been submitted, noting the remittitur had issued in his underlying appeal and the appeal was, by then, final. It is apparent the deputy clerks handling the materials did not realize the documents in the boxes were to be considered along with the original letter and the unidentified petition, although petitioner's letter asked for confirmation that the court had received the letter "and five large boxes containing [petitioner's] petition."

It is clear that the court, at some point, received a habeas corpus petition because, on May 4, 2006, the clerk's

office sent a letter returning the "petition" as unfiled because two pages of the state habeas corpus form were missing.

On May 8, 2006, according to the court's internal records, the prison returned the boxes of materials to the clerk. On that date, the office staff destroyed the materials contained in the five boxes.

On May 12, 2006, apparently in response to the court's letter returning the first petition, the court received a letter and second habeas corpus petition from petitioner written May 2, 2006, stating that he had been forced to use a federal habeas form because he was locked down, and stating that our office now had his five boxes "in our storeroom somewhere."

For the first time, a case number was assigned to the habeas corpus matter and a file was opened. Even so, the clerk's office wrote petitioner two letters on May 18, 2006, and June 12, 2006, erroneously informing him that the court had never received the boxes of materials. Petitioner replied that he had sent the materials and provided documentary evidence that the clerk's office had received the boxes.

On June 19, 2006, the court's internal investigation revealed that the boxes of materials had been destroyed by the clerk's office when they were returned on May 8, 2006, after having been refused by the Mule Creek State Prison mail room.

On July 3, 2006, after the court had informed petitioner that the written materials in the boxes had been mistakenly destroyed, the court received a letter from petitioner explaining that he was including a copy of the habeas corpus

petition along with a 204-page handwritten document setting forth in detail the basis for the petition. He noted that the new petition and accompanying 204-page document provided "better clarity" on the merits of the petition.

On August 15, 2006, after reviewing these documents and additional correspondence from petitioner, the clerk's office wrote to petitioner detailing the materials this court intended to consider including the July 3, 2006 petition, the superior court habeas file, the May 12, 2006 petition, and the trial transcripts. We asked petitioner to tell us whether these materials "encompass[ed]" the documents contained in the five destroyed boxes and invited him to provide us with any other documents or materials he wanted us to review.

On August 21, 2006, we received petitioner's response to our letter. He asked only for a copy of the exhibits because he could not recall if the numbers matched the "breakdown included in this letter." He did not send or refer to any additional documents or exhibits that he wanted the court to consider on the petition.

We accept petitioner's representation that the July 3, 2006 petition is a copy of the petition enclosed in the five boxes of materials. We have reviewed this petition along with the form petition filed May 12, 2006, and the other materials referred to in the clerk's letter dated August 15, 2006.

We take judicial notice of the transcripts and briefing in the underlying appeal, already on file in this court. (Case No. C045817; Evid. Code, § 459.) We have reviewed these records

along with the petition. We assume those materials were also in the five boxes of destroyed documents.

We take judicial notice of the superior court habeas corpus petition in case No. 05F11509. That petition includes numerous exhibits including documents and discovery outside the appellate record, also referenced in the petition in case No. C052607, which are apparently referenced in the July 3, 2006 petition. We have reviewed these records. We assume those materials were also in the five boxes.

Petitioner's numerous grounds for relief set forth in his May 12, 2006 petition, his July 3, 2006 petition, and his superior court petition and accompanying exhibits, largely concern the inadequacy of trial counsel's representation, the prosecution's failure to preserve evidence, the use of false evidence, and his actual innocence. Those claims, as noted, fill more than 200 hand written pages. We have reviewed his arguments and all cited and supporting documents provided by petitioner, which include transcripts, police reports, and internet reference articles.

Having completed our review of all documents provided by petitioner to the superior court and to this court, including but not limited to the trial transcript, we conclude that the petition for habeas corpus must be denied. Petitioner's grounds for habeas corpus are barred because (1) the issues raised could have been raised on direct appeal and were not (*In re Dixon* (1953) 41 Cal.2d 756, 759); (2) the issues were already adjudicated on direct appeal (*In re Waltreus* (1965) 62 Cal.2d

218, 225); and (3) petitioner failed to make a prima facie case that trial counsel's errors, if any, were prejudicial. ("If counsel's omission falls 'below an objective standard of reasonableness . . . under prevailing professional norms' (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688), the defendant may assert the error in a habeas corpus petition 'clothed in "ineffective assistance of counsel" raiment.' [Citation.] The defendant would be entitled to habeas corpus relief if there is a 'reasonable probability' (*Strickland v. Washington, supra*, 466 U.S. at p. 694) that defense counsel's incompetence in not objecting affected the trial's outcome." (*In re Seaton* (2004) 34 Cal.4th 193, 200.))

We note that in some of the correspondence we have received from petitioner in this proceeding, he has asked for an evidentiary hearing.

In reviewing a petition for habeas corpus relief, an appellate court must first ask "whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief. [Citations.] If no prima facie case for relief is stated, the court will summarily deny the petition. If, however, the court finds the factual allegations, taken as true, establish a prima facie case for relief, the court will issue an [order to show cause]. [Citations.] 'When an order to show cause does issue, it is limited to the claims raised in the petition and the factual bases for those claims alleged in the petition. It directs the respondent to address only those issues.' [Citation.] Issuance of an [order to show cause],

therefore, indicates the issuing court's *preliminary assessment* that the petitioner would be entitled to relief if his factual allegations are proved." (*People v. Duvall* (1995) 9 Cal.4th 464, 474-475.)

Because we conclude petitioner has not presented a *prima facie* case for relief, petitioner's request for an evidentiary hearing is denied.

The petition for writ of habeas corpus is denied.

The clerk of this court shall send copies of all judicially noticed exhibits and pleadings found in the habeas corpus superior court file to petitioner. The original superior court trial file and habeas corpus file will be returned to the superior court following the finality of this order. Petitioner's trial transcripts will be returned to the court's archives.

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HULL, Acting P.J.

We concur:

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BUTZ, J.

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CANTIL-SAKAUYE, J.